



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 18, 2003

Ms. Beverly West Stephens
Gale, Wilson & Sánchez
115 East Travis, Suite 618
San Antonio, Texas 78205

OR2003-4999

Dear Ms. Stephens:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 184541.

The South San Antonio Independent School District (the "district"), which you represent, received a written request from an attorney for 1) a named district employee's date of birth, address, and telephone number, 2) the employee's complete personnel file, and 3) the tape recording and transcript of a meeting that the employee attended. You contend that the requested information is excepted from required disclosure pursuant to sections 552.101, 552.102, 552.103, and 552.117 of the Government Code. We have also received written comments from the requestor regarding his request. *See* Gov't Code § 552.304.

We initially note that the among the documents you submitted to this office as responsive to the records request are numerous employment contracts and performance evaluations, the disclosure of which is governed by section 552.022 of the Government Code. Section 552.022 provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, *evaluation*, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(3) information in an account, voucher, or *contract* relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3) (emphasis added). The submitted records contain "completed evaluations" made public under section 552.022(a)(1) and employment contracts made public under section 552.022(a)(3). Consequently, the district must release these records unless they are expressly made confidential under other law.¹ As noted above, you contend that the submitted records are excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.); Open Records Decision No. 542 at 4 (1990) (governmental body may waive section 552.103). Thus none of the submitted performance evaluations or employment contracts may be withheld on the basis of section 552.103. Consequently, the district may withhold those records only to the extent they are made confidential under other law. However, because the district is required by law to withhold information coming within the protection of sections 552.101, 552.102, and 552.117 of the Government Code, we will consider the applicability of these exceptions to the records at issue.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 21.355 of the Education Code provides that "[a]ny document evaluating the performance of a teacher or administrator is confidential." This office has interpreted this section to apply to any document that evaluates the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* at 4. Similarly, an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id.*

In this instance, however, you have not informed us whether the evaluations relate to an individual who held a teacher's or administrator's certificate under chapter 21 of the Education Code and was performing the functions of a teacher or administrator at the time of the evaluations. Assuming, however, that the teacher/administrator in question satisfies both of those criteria, we conclude that the evaluations are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. *See* Open Records Decision No. 643 at 4. Otherwise, the district may not

¹ We note that you have not raised section 552.108 for the submitted evaluations. *See* Gov't Code § 552.022(a)(1).

withhold the evaluations under section 552.101 in conjunction with section 21.355 and the evaluations therefore must be released to the requestor.

You contend that the submitted employment contracts are excepted from required public disclosure pursuant to section 552.102(a) of the Government Code, which protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" Section 552.102 is designed to protect public employees' personal privacy. The scope of section 552.102 protection, however, is very narrow. See Open Records Decision No. 336 (1982); see also Attorney General Opinion JM-36 (1983). The test for section 552.102 protection is the same as that for information protected by common-law privacy under section 552.101: the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.). The employment contracts reflect the terms and conditions under which the district employee was employed by the district, and as such cannot be deemed to be outside the realm of public interest. Section 552.102 was not intended to protect this type of information. Consequently, the district may not withhold any of the submitted employment contracts pursuant to section 552.102.

We note, however, that one of the submitted contracts contains information that the district may be required to withhold pursuant to section 552.117 of the Government Code. Section 552.117(a)(1) requires that the district withhold, among other things, information that relates to an employee's home address, but only if the employee elected to keep this information confidential in accordance with section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for the information is made. See Open Records Decision No. 530 at 5 (1989). Therefore, in order to withhold section 552.117(a)(1) information from the public, a proper election must be made prior to the receipt of the request for information. We therefore conclude that if the employee made a timely section 552.024 election, the district must withhold the information we have marked in the employment contract pursuant to section 552.117(a)(1) of the Government Code.

We now address the extent to which the remaining submitted records are subject to required public disclosure. We first note that some of the documents you submitted to this office consist of medical records that are made confidential under the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001 *et. seq.* Section 159.002 of the Occupations Code provides in pertinent part:

- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). The medical records that we have identified must be released only as provided under the MPA. Open Records Decision No. 598 (1991).

We now address your section 552.103 claim for the remaining submitted documents. Section 552.103 of the Government Code is known as the "litigation" exception. A governmental body has the burden of providing relevant facts and documents to show that section 552.103 is applicable in a particular situation. Under section 552.103(a) and (c), the test for meeting this burden is a showing that (1) litigation involving the governmental body is pending or reasonably anticipated at the time of the records request, and (2) the information at issue is related to that litigation. *See also University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

You contend that the requested information relates to reasonably anticipated litigation involving the district. The mere chance of litigation will not trigger section 552.103. Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4.

In this instance, you have demonstrated that the requestor's client has made several threats of litigation against the district, has hired an attorney, and has demanded a monetary settlement from the district. Given your representations and our review of the submitted

documents, we conclude from the totality of the circumstances that litigation involving the district was reasonably anticipated at the time the district received the current records request and that the submitted records “relate” to that litigation for purposes of section 552.103. We therefore conclude that the district may withhold the remaining submitted records pursuant to section 552.103 of the Government Code.²

In summary, the district must release the submitted employment contracts to the requestor, but must redact the information we have marked in one of the contracts pursuant to section 552.117(a)(1) if the employee made a timely election under section 552.024. The performance evaluations must be withheld pursuant to section 21.355 of the Education Code if the teacher/administrator satisfies the criteria set out in that provision; otherwise, the evaluations must be released to the requestor. The submitted medical records may be released only in accordance with the MPA. The district may withhold the remaining submitted records pursuant to section 552.103.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

²In reaching this conclusion, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). If the opposing party in the anticipated litigation has seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103. We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

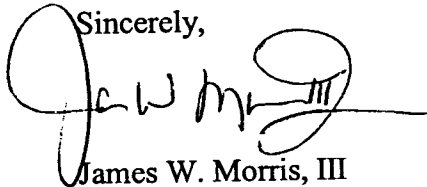
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J W Morris III', with a stylized flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/RWP/seg

Ref: ID# 184541

Enc: Submitted documents

c: Mr. Michael J. Currie
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(w/o enclosures)